TABLE OF AUTHORITIES

PAGE

Housing—A Report to Mayor William O'Dwyer, by the New York City Housing Authority 2

Tax Subsidies for Rental Housing", Walter J. Blum and Norman Bursler, 15 Chicago L. R. 255 2

Murray v. LaGuardia, 291 N. Y. 320 (1943), cert. den. 321 U. S. 771 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 402

JOSEPH DORSEY, MONROE DOWLING and CALVIN HARPER,
Petitioners,

VS.

STUYVESANT TOWN CORPORATION and METROPOLITAN LIFE INSURANCE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

This reply brief is submitted in order to clarify certain factual questions raised by respondents' brief in opposition to our petition for certiorari. We make no effort here to discuss the basic differences between the parties since we believe that the brief in opposition itself plainly discloses that the question raised by the petition is substantial and important.

1. Respondents state on page 48 that "under the Statute" the tax exemption and, with it, the limitation on rents, may be lifted at any time if the owner elects to pay up the accrued taxes and dissolve the redevelopment company. While this is true "under the Statute", it is not true with respect to the Stuyvesant Town Project. The contract between the City and respondents prevents resort to this aspect of the Act for five years after completion of the project, which is when the tax exemption commences (R. 109, 120). We have been advised by the New York State Tax Department that the exemption went into effect on July 1, 1949. Hence, it must continue at least until June 30, 1954. Moreover a repayment of the taxes obviously would not undo the benefits of the condemnation proceedings which assembled the plot.

In any case, we believe it is irrelevant whether the tax exemption and rent control may be lifted. They have not been lifted. The present tenants, selected discriminatorily, are enjoying their benefits.

2. Respondents urge that the tax exemption is not paid for by city residents because it costs the City nothing (pp. 41-43). Commissioner Moses and the City have only recently described this exemption in its true terms as a "subsidy" ("Housing—A Report to Mayor William O'Dwyer", published by the New York City Housing Authority in August, 1949). As to this, we respectfully refer this Court to the exposition of the effects of tax exemption in an article entitled "Tax Subsidies for Rental Housing", by Walter J. Blum and Norman Bursler, 15 Chicago L. R. 255. That article shows that, even a tax exemption which does not lower taxes on a piece of property but merely freezes them at a given rate, lowers the total tax return to a city. In addition, the decisive issue here is not the cost to the City but the disposition of benefits created by city and state action.

3. Respondents assert that they were given no power of condemnation "directly or indirectly" (p. 46). That statement is plainly erroneous. Although the condemnation was conducted in the City's name, the real authority to condemn lay with respondents. The contract provided that "the City, at the request of the Corporation, shall institute" the necessary proceedings (R. 96). The City was given no discretion in the matter. The condemnation power was invoked only as to those parts of the tract which Metropolitan had not already acquired (R. 100). Moreover, the Corporation paid for the condemnation as it went along (R. 97).

In any case, the difference between condemnation *by* respondents and condemnation by the City *for* respondents is certainly without any significant bearing on the constitutional issue.

4. Respondents describe as "misleading" our contention that the City assisted the project with a transfer of land which gave the project a net gain of 500,000 square feet, or nearly 19% of the total area (p. 46). Our statement is in the language of the complaint, the allegations of which are deemed true at the present stage in the proceeding (R. 68-69). Moreover, respondents' only answer to this allegation is a reference to a bare assertion by Commissioner Moses at the Board of Estimate hearing in 1943 that the exchange actually benefited the City (R. 151). However, Commissioner Moses did not explain then or at any other time how he arrived at that conclusion.

5. Respondents note that certain statutory controls by the supervising agency were terminated pursuant to Section 15 when the Superintendent of Insurance approved the contract (pp. 47-48). None of the statutory controls referred to in our petition (pp. 6, 13-14) were affected by this provision and the various controls specified in the contract are likewise unaffected.

6. Respondents assert that "neither the phrase 'moderate rent housing' nor its equivalent appears in either the Constitutional or the Statutory provisions relating to rehabilitation" (p. 31, note). It is true that this *phase* does not appear. But the statute *requires* construction and operation of just such housing, as we show in our petition (pp. 6, 13).

Failure to recognize the existence of this requirement is an outstanding feature of the Brief in Opposition. It ignores the central fact that 25,000 people are now enjoying the benefits of moderate rent housing, made possible and required by the State and City. In view of the plain requirement of the statute and contract that housing be created and that the rents in such housing be limited, it cannot be said that the state powers were not used to create that benefit.

7. Respondents argue that the sole purpose of the Redevelopment Companies Law and the contract with the City was slum clearance and rehabilitation (pp. 20-21, 31, 32). We submit that the Stuyvesant Town Housing project and the provision of apartments for 8,700 families cannot be viewed as something that just happened—as an incidental result of what was unquestionably state action. It was part of the constitutional, statutory and contractual scheme that additional housing units be made available at moderate rents; the State and City continue to play an integral part in the operation, even though the housing has been completed and is now being occupied.

In support of their argument, respondents urge that the New York State Constitution distinguishes between low rent and limited rent housing and permits only the former to be constructed, owned and operated by public agencies (pp. 5-7). They urge that, "The absence of an intent on the part of the State to convert the activity to a public activity is apparent from the history of the Housing Article and the Statute" (p. 52). As a matter of fact, New York City is at this moment renting public housing at about $17 a room, the same rate as that approved by the City for

Stuyvesant Town (R. 67; statement of New York City Housing Authority, released September 10, 1949, and October 29, 1949).

In any event, we submit that the "intent" of the Legislature as to whether or not the project would be "a public activity" is irrelevant. There is no question but that the State, by appropriate constitutional and statutory provisions, could provide such housing as Stuyvesant Town through its own instrumentalities. Its decision to do so by "cooperation" with private enterprise does not sterilize the results of all public character.

Respondents rely on *Murray* v. *LaGuardia*, 291 N. Y. 320 (1943), cert. denied 321 U. S. 771. We do not believe that the Court of Appeals there held, as respondents insist (pp. 20, 22, 25, 31, 45), that the public purpose of the statute was entirely satisfied as soon as the last brick was put in place. But even if there was such a holding, it would not control the constitutional question here. If the Stuyvesant Town apartments were provided by "State action", within the meaning of the decisions of this Court, it makes no difference how the operation was viewed by the state legislature or courts.

8. Running through the Brief in Opposition is the suggestion that petitioners "would foreclose the state from cooperation with private enterprise" (pp. 23-24) and that they would make it impossible for the State to "deal flexibly and progressively with the many intricate problems raised by modern day civilization" (pp. 52, 53). It is argued that this Court should not "negate" the decision of the New York State Legislature that the exercise of state powers and supervision was necessary and desirable in order to achieve the legitimate public objectives of moderate rent housing (p. 40, note).

Manifestly, we are not arguing that the judgment of the State as to how to obtain housing should be overruled. We urge only that racial discrimination in selecting the Stuyvesant Town tenants is unconstitutional and should

be enjoined and that it makes no difference that the discrimination is effectuated by cooperation with private enterprise rather than by direct state action.

Respectfully submitted,

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November 22, 1949.